

Arch L. Heady & Son Highland Central Funeral Home, Inc. and Arch L. Heady & Son Portland Memorial Funeral Home, Inc. and Carol A. Lewis. Cases 9-CA-19249 and 9-CA-19350

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 12 September 1983 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondents violated Section 8(a)(1) and (3) of the Act by failing to recall employee Carol A. Lewis in February 1983 because of her union activities. We find merit in the Respondents' exceptions to this finding.

The facts, as more fully set forth by the judge, are as follows. The Respondents own and operate funeral homes in Jefferson County, Kentucky. In October 1978 the Respondents hired Carol Lewis as an apprentice funeral director at their Fern Creek home. In the fall of 1980 Lewis began a union organizing campaign. During the same period, employee David Smith was told by one of the Respondents' managers that the manager of the Respondents' Oak Street home said that anyone connected with the Union would be gotten rid of. On 5 November 1980 the Respondents' president, Arch L. Heady, informed Lewis that she would be terminated due to a decline in business. Lewis filed

¹ The complaint in Case 9-CA-19249 alleges that the Respondents violated Sec. 8(a)(4) and (1) of the Act by filing a lawsuit against employee Carol A. Lewis in Jefferson Circuit Court, Kentucky, because of Lewis' filing of unfair labor practice charges with the Board. The judge, noting the pendency of the state action and the opinion of the United States Supreme Court in *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161, 97 LC ¶ 10,130 (1983), granted the General Counsel's posthearing motion and ordered severance of Case 9-CA-19249 and a stay of proceedings therein until completion of the state action. No exceptions were filed to the judge's severance order.

The judge did not address the alleged violation of Sec. 8(a)(4) of the Act in Case 9-CA-19350 as to the Respondents' failure to recall Lewis in February 1983. No exceptions were filed to the judge's failure to make findings and conclusions in this regard, and the allegation will not be further considered.

an unfair labor practice charge over her termination.²

In January 1981 the Respondents notified Lewis of improving business conditions and reemployed her at the Fern Creek home. Shortly after Lewis returned to work, she received her licenses as a funeral director and embalmer. In February 1981 Lewis and Heady attended a funeral conducted by a Reverend Hancock. Hancock pulled Lewis and Heady together and, in an apparent joke, said that Lewis should organize the ministers when she finished with the funeral directors. Heady replied, "No union, there won't be any Union."

In April 1981 the Respondents and other mortuary firms in the area formed Kentuckiana Allied Mortuary Service, Inc. (KAMS). KAMS performs commercial embalming among other mortuary services, and after April 1981 the Respondents contracted out their embalming work to KAMS. Employee Smith testified that after the formation of KAMS he "transferred" to it from the Respondents' Oak Street home.

On 18 August 1981 Lewis sent a letter to Heady indicating that she was continuing her efforts to organize a union in the local funeral industry and was responsible for a prounion leaflet earlier sent to various funeral directors and embalmers in the community.

In August or September 1981, the Respondents sold two of their funeral homes, including the Fern Creek home at which Lewis was employed. The Respondents notified Lewis of the sale and informed her that she would be laid off, subject to recall when an opening occurred in one of the funeral director/embalmer positions in the Respondents' homes. Lewis filed an unfair labor practice charge over her layoff. This charge was withdrawn by Lewis after investigation by the Regional Director.

In February 1982 the Respondents hired Sheila Sayre as an unlicensed employee performing housekeeping and administrative duties at their Portland Memorial home. Upon learning of Sayre's hiring, Lewis filed an unfair labor practice charge alleging that the Respondents unlawfully failed to recall her. This charge was withdrawn by Lewis after investigation by the Regional Director.

In March or April 1982 Lewis telephoned Heady as she had periodically done since the time of her layoff. Heady told Lewis that she did not need to call every month because Heady anticipated no openings for a double-licensed employee, i.e., an

² The Regional Director issued a complaint on this charge. Subsequently, the case was settled when the Regional Director approved an informal settlement agreement containing a nonadmissions clause.

employee licensed as both a funeral director and embalmer. Heady then asked Lewis if she would honestly answer a question. Lewis said yes, and Heady asked if Lewis honestly thought she would get back to work at a funeral home. Before Lewis could answer, Heady said that he hoped Lewis did not think she was coming back to work for Heady or for anyone else. During this same period of time, the manager of the Respondents' Oak Street home told employee David Smith that Heady would sell a funeral home before he would hire Lewis back.

On 20 May 1982 KAMS terminated David Smith. Smith asked to meet with KAMS management and the board of directors. In the ensuing meeting, attended by Heady as a director of KAMS, Smith asked to return to the Respondents' staff. Heady told Smith that Heady would have to rehire Lewis first, that Lewis had caused Heady a lot of trouble, and that Heady did not want Lewis back causing trouble.

Sometime after June 1982 Lewis learned that the Respondents had permitted three apprentices to become funeral directors/embalmers after receiving their licenses. Lewis filed another unfair labor practice charge over the Respondents' failure to recall her to one of the positions occupied by the newly licensed employees. This charge was dismissed 12 November 1982 after investigation by the Regional Director.

In the middle of 1982 the Respondents began operations at their newly constructed Westport home and the Beechmont home purchased by the Respondents earlier in 1982. The Respondents determined to staff these homes with existing personnel inasmuch as the Respondents then had 15-20 double-licensed employees available to supervise or conduct the sporadic or emergency embalming work not performed by KAMS.

In October 1982 and January 1983 William Anderson, the former manager of the Respondents' Fern Creek home, made separate statements to David Smith and David Cox, former employees of the Respondents, to the effect that Lewis was no longer employed by the Respondents because of her union activities.

In February 1983 the Respondents hired Allen Shawler as a funeral director at their Beechmont home. Shawler was a former employee of the Respondents with experience at the Beechmont home. On learning of Shawler's employment, Lewis filed the unfair labor practice charge in Case 9-CA-19350.

The judge concluded, largely in reliance on evidence of the Respondents' animus toward Lewis and her union activities, that the General Counsel

made a prima facie showing that Lewis' union activities were a motivating factor in the Respondents' decision not to recall her.³ The judge further concluded that the Respondents' prior business decisions revealed a pattern of conduct by the Respondents aimed at reducing their need for Lewis' skills and avoiding her recall. The judge finally concluded that the Respondents' asserted reasons for hiring Shawler as funeral director at the Beechmont home rather than recalling Lewis were pretextual and inferred from this conclusion that the Respondents' motives were unlawful.

We do not agree with the judge's conclusion that the Respondents engaged in a pattern of conduct designed to reduce their need for Lewis' embalming skills and avoid her recall. The conduct on which the judge relied in reaching this conclusion included the Respondents' formation of KAMS; employee Smith's "transfer" to KAMS and the Respondents' failure to offer Lewis a similar opportunity;⁴ the Respondents' sale of the Fern Creek home and their layoff of Lewis; the Respondents' conditioning Lewis' recall on their need for a double-licensed employee while subsequently promoting three apprentices to such positions and permitting Sayre to train for promotion to a double-licensed position; the Respondents' decision to staff the Westport and Beechmont homes with existing personnel rather than recalling Lewis; and the Respondents' hiring of Shawler at its Beechmont home rather than recalling Lewis. The judge found that the foregoing actions had the appearance of validity. Nevertheless, the judge concluded that, when the Respondents' actions were collectively considered, they showed a pattern going beyond coincidence and suggested that the Respondents made business decisions which maximized their ability to avoid Lewis' recall.

The record reveals, and the judge acknowledged, that many of the Respondents' actions were previously considered by the Regional Director in

³ The Respondents except to the judge's admission into evidence and consideration of evidence on which he concluded that the Respondents had animus toward Lewis and her union activities. We agree that, as neither the Respondents' state court action against Lewis nor Heady's comments before the Kentucky State Board of Embalmers directly concerned Lewis' union activities, they cannot support a finding of union animus. We also find merit in the Respondents' exceptions to the judge's consideration of the statements made by William Anderson in October 1982 and January 1983, for, while the record reveals that Anderson occasionally provides services to the Respondents for a fee, it does not support a finding that Anderson is an agent of the Respondents.

⁴ The record does not reveal what Smith meant by saying he "transferred" to KAMS and KAMS was not alleged to be a joint employer with the Respondents. While Heady is a majority shareholder and director of KAMS, its day-to-day operations are handled by officers associated with local mortuary firms other than the Respondents. The Respondents pay for the services provided by KAMS and the record contains no evidence that the Respondents' dealings with KAMS are other than arm's-length transactions.

unfair labor practice charges which were withdrawn or dismissed following investigation. In addition, it is undisputed that Lewis was told she would be recalled when a vacancy arose in a double-licensed position and that no such position became available after Lewis' layoff. Though the judge implied that the Respondents had no policy of promoting apprentices to double-licensed positions, the record reflects that Lewis herself was promoted from an apprentice position and the Respondents adduced testimony in support of this policy which was uncontroverted on the record. The record likewise contains no evidence that the Respondents' participation in the formation of KAMS or its mid-1982 decision to staff its Westport and Beechmont homes with existing personnel was in any way related to a desire by the Respondents to discriminate against Lewis because of her union activities. Further, the record reveals that the Respondents' sale of the Fern Creek home and the resulting layoff of Lewis was based on valid business considerations. The evidence reveals that on 31 July and 15 September 1981, respectively, the Respondents sold the Heady/Ellis funeral home in Leitchfield, Kentucky, for \$225,000 and the Fern Creek home for \$625,000. The record contains uncontroverted testimony and documentary evidence that both homes were unprofitable and lost substantial sums of money in fiscal years 1980 and 1981. Further, there is undisputed evidence that the Respondents' president, Heady, had since 1976 planned the construction of a new home on Westport Road and that the sale of the unprofitable homes created the positive cash flow necessary for such construction. In addition, the Respondents adduced uncontradicted testimony that certain amendments to the Federal tax laws and the availability of potential buyers made the sale of these homes financially feasible in 1981. Finally, the Respondents introduced un rebutted testimony that, at the time of the sale of the Fern Creek home, the Respondents had no openings in positions at its other homes to which Lewis could be transferred. Under the circumstances, we find that the Respondents' actions are fully supported by evidence of valid business justifications and the judge's conclusion that the Respondents engaged in substantial business dealings to avoid Lewis' recall strains credulity.

We also disagree with the judge's conclusion that the Respondents' asserted reasons for hiring Shawler at their Beechmont home rather than recalling Lewis are pretextual. The Respondents claimed that they hired Shawler on a temporary, part-time basis which they assumed Lewis would find unacceptable. The Respondents further assert-

ed that the Beechmont home was losing money in February 1983 and that the Respondents did not wish to recall Lewis when her embalming skills were not needed and the Respondents could pay Shawler a lower salary. The record reveals that, when last employed by the Respondents, Lewis earned \$4.50 per hour plus benefits valued at \$300 per month, whereas Shawler was paid an initial salary of \$200 per week. In addition, the Respondents introduced testimony and documentary evidence that in February 1983 the Beechmont home was showing a fiscal year loss of approximately \$8000. Unlike the judge, we find that Shawler's pay was not "comparable" to what the Respondents last paid Lewis, for Lewis' monthly salary and benefit payments exceeded Shawler's initial salary by approximately \$220 per month or \$2640 per year.⁵ We find this difference substantial particularly when viewed in conjunction with the fiscal year losses experienced by the Respondents' Beechmont home.

Finally, Lewis was informed in August 1981 that the Respondents would recall her when a position opened for a double-licensed employee at one of its homes. No such position has become available, and it is not disputed that Shawler's position requires only a director's license. Based on all the foregoing, we find that the record amply supports the Respondents' contention that Lewis was not recalled for valid business reasons.⁶

Accordingly, we conclude that, assuming arguendo that the General Counsel made a prima facie showing that Lewis' union activities were a motivating factor in the Respondents' decision not to recall her, the Respondents have met their burden of demonstrating that Lewis would not have been recalled absent her union activities. We shall therefore dismiss the complaint in Case 9-CA-19350 in its entirety.

ORDER

The National Labor Relations Board orders that the complaint in Case 9-CA-19350 is dismissed in its entirety. The Board further orders that Case 9-CA-19249 is severed and consideration of the matters therein is stayed pending such further action as

⁵ Shawler was also permitted to live at the Beechmont home free of charge in return for making certain renovations. This fact does not affect our conclusion that Shawler's pay was not comparable to the wages and benefits last paid to Lewis.

⁶ The record does not reveal the number of hours per week worked by Shawler at the Beechmont home. The Respondents' president testified that Shawler may have worked as many as 40 hours per week or more. Under these circumstances, we do not find the Respondents' claim that Shawler was hired on a part-time basis supported by the record. This does not affect our decision that the Respondents did not recall Lewis for valid business reasons.

may be necessary in response to appropriate pleadings filed by the General Counsel or the Respondents subsequent to the conclusion of the matter in Civil Action No. 82-CI-10416, Jefferson Circuit Court, Kentucky.

MEMBER DENNIS, dissenting.

Contrary to my colleagues, I would adopt the judge's finding that the Respondents violated Section 8(a)(3) by not offering employee Carol Lewis recall to the funeral director position available at the Beechmont home in February 1983.

The General Counsel established a strong prima facie case based on substantial evidence of the Respondents' animus toward Lewis because of her union activities. Indeed, the Respondents' president frankly told Lewis, "I hope you don't think you are coming back to work for me because you are not."

In addition, the judge correctly rejected the Respondents' asserted reasons for hiring Allen Shawler rather than Lewis for the Beechmont funeral director position. Even my colleagues concede that they can find no record support for the Respondents' claim that Shawler was hired on a part-time basis. Equally without merit is the contention that Lewis was not recalled because she was a "double-licensed" employee (i.e., qualified to be both funeral director and embalmer) and the Beechmont position required only one license. As the judge pointed out, while the Respondents were limiting Lewis' recall opportunities to a double-licensed position, they were contracting out embalming work and thereby substantially eliminating any future need for a double-licensed employee. In fact, no such position has been available since Lewis' 1981 layoff. When the Beechmont vacancy arose in 1983, the Respondents did not even consult Lewis, even though she was qualified to fill it. These facts support the inference that the Respondents were deliberately limiting Lewis' recall opportunities to a position they knew was unlikely to exist. The Respondents' president conceded as much in 1982 when he told Lewis not to call in every month because he did not anticipate any openings for a double-licensed employee. Accordingly, the judge was warranted in rejecting the Respondents' double-licensed defense as nothing more than a pretext to mask their desire never to call Lewis because of her union activities.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Louisville, Kentucky, on June 2 and 3, 1983. The proceedings are based on charges

filed January 27, 1983, as amended February 18 and 22, 1983, by Carol A. Lewis, an individual. The proceedings were consolidated for hearing by order of the Regional Director dated March 17, 1983. The General Counsel's complaint alleges that the Respondents, Arch L. Heady & Son Highland Central Funeral Home, Inc. and Arch L. Heady & Son Portland Memorial Funeral Home, Inc., of Louisville, Kentucky, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by failing and refusing to rehire or recall Carol A. Lewis in or about February 1983, because of her past union activities and by filing a retaliatory and baseless lawsuit in or about December 1982 against former employee Lewis.

Briefs were filed by the General Counsel and Respondents. On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Arch L. Heady III operates three corporations engaged in the funeral home business including the two Respondents in the instant case, Highland Central and Portland Memorial, and a third corporation known as Arch L. Heady and Sons, Southern Funeral Home. These three corporations currently operate nine funeral homes in the Louisville area. They sold off two of their funeral homes in 1981 (as well as one in Leitchfield, Kentucky), one each from Southern and Portland Memorial. One of the latter homes was the Fern Creek Home, where the Charging Party herein previously worked. Respondents admit the Board's jurisdiction over Highlands Central but assert a lack of jurisdiction over Portland Memorial because, in 1982, it had only \$113,129 in gross income (projected \$200,000 in 1983) and out-of-state purchases of only \$12,000 annually, citing *Carolina Supplies Co.*, 122 NLRB 88 (1958). The General Counsel, however, asserts that the facts show a joint employer status which establishes jurisdiction, citing *Soule Glass & Glazing Co.*, 246 NLRB 792 (1979), and *Berkshire Concrete Corp.*, 238 NLRB 1658 (1978).

The record shows that Heady serves as the president of all three corporations, whose corporate and administrative offices are all located at Highlands Central's new Hikes Points Funeral Home. At that location they process all paperwork, issue all paychecks, direct labor relations policies, and otherwise direct the day-to-day operations of the three companies. Each of the nine homes has its own manager who reports directly to Heady. Personnel and equipment are moved between the homes as needed, without charges being assessed to the user company.

The names of all three corporations begin with the prefix "Arch L. Heady & Son" and Arch L. Heady III and members of his family control slightly less than half of the stock in the Portland Memorial Home and an overwhelming majority of the stock in the Southern and Highlands Central corporations. Moreover, the Highlands and Portland corporations share common officers and substantially similar boards of directors. Although

day-to-day operations and power to hire and fire are said to be vested in the manager of each funeral home, Heady is undisputedly the chief executive officer of all three Heady Funeral Home corporations.

While the corporations maintain centrally located bookkeeping and corporate records, each funeral home has a separate manager's bank account in different banking institutions and they separately maintain bank, insurance, and payroll records. Separate corporate bank accounts are maintained for each of the three corporations. Insurance premiums for property, casualty, and medical and hospitalization insurance are apportioned to each home according to its portion of the risk and are eventually charged to the appropriate corporate account. Each home does its own billing for sales and services and each home purchases its own caskets. There is no permanent interchange of employees or supervision between the corporations and employees are not entitled to "bump" employees in other homes or corporations; however, the Charging Party testified that she worked on various occasions at each of Respondents' funeral homes during her tenure at Respondents. One set of work rules governs all employees of the three corporations and all employees of the three corporations receive comparable fringe benefits. All employee relations problems eventually find their way to Heady or one of his top assistants. Heady admits that the three corporations are essentially a cooperative venture.

Heady also holds the mortgage note on the "spun off" Fern Creek Home and Respondents maintain a close relationship with that home inasmuch as they supplied vehicles, needed materials, personnel, assistants, and other services, when needed by the new owner, William Anderson.

Under these circumstances, it is concluded that, despite the existence of a few factors that could tend to indicate a separate employer status, the overall record shows that the operations of all three corporations are interrelated, centralized, and primarily controlled by Heady. Despite apparent authority to make local decisions on hiring and firing at individual homes, in practice personnel and labor relation decisions rest with Heady's ultimate centralized authority. Also, common ownership and financial control exist, regardless of less than majority ownership in the Portland Memorial corporation's stock. Accordingly, I conclude that the Highlands Central and Portland Memorial companies constitute a single employer for jurisdictional purposes. See *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962). Respondents' operations, taken together, meet the Board's jurisdictional requirements and it is concluded that they are employers engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Lewis was first employed by Respondents in October 1978 at the Highlands Central Fern Creek home. She was hired by Manager William Anderson as an apprentice funeral director. Subsequently, on January 15, 1981, she received her funeral director's and embalmer's licenses. Lewis began a union organizational campaign at

Respondents' funeral homes during the fall of 1980, and was discharged on November 6, 1980. She filed a charge, Case 9-CA-16065, with the Board alleging that her discharge was in retaliation for involvement in union activities. A complaint was issued and, shortly thereafter, employee David Cox was also discharged by Respondents and he filed a charge, Case 9-CA-16345, with the Board. The cases were consolidated for hearing scheduled for August 1981. By letter of January 12, 1981, Lewis was recalled to a position as funeral director.

Lewis testified that in February 1981, shortly after her recall, she was present at a funeral conducted by a Reverend Hancock. When Hancock saw Heady approaching where Lewis was standing he took their hands and pulled Lewis and Heady together. Hancock made a remark to the effect that, when Lewis got through organizing the Union, he would like her to organize the ministers. Heady responded by saying, "No union, there won't be any union."

Kentuckiana Allied Mortuary Service, Inc. (KAMS) was formed on April 1, 1981. Heady is a part owner and board member of that service. David Smith, who was an apprentice embalmer and funeral director at Portland Memorial's Oak Street Home, testified that he "transferred" to KAMS as an embalmer in April 1981. From that date forward, the majority of the work formerly performed by licensed embalmers in the Heady corporations, as well as other area funeral homes, was contracted out to KAMS.

During late July or early August 1981, a settlement was reached in the noted complaint proceeding which was approved by the Regional Director by date of September 9, 1981. During the same period of time, Heady sold two of Respondents' funeral homes and, in addition, the Heady/Ellis funeral home in Leitchfield, Kentucky, was sold on July 31, 1981. The Fairdale home was sold on September 1, and the Fern Creek home was sold on September 15, 1981. Heady testified that the homes were not profitable and that he and Respondents' treasurer felt that the homes were consuming large amounts of cash which could otherwise be invested in new, more profitable homes. Heady also needed positive cash flow in order to build a planned new funeral home on Westport Road. By selling the Fern Creek and Fairdale homes Heady was able to realize a positive cash flow by eliminating annual losses, salaries, and nearly \$90,000 in overhead attributable to those two homes. He also was able to take advantage of new tax laws passed in 1981 which permitted accelerated (15 year) depreciation of real estate. Accordingly, construction of the Westport Road facility became economically feasible.

Potential buyers were available at that time, including Manager William Anderson, who was willing and able, as a result of capital received as an inheritance and favorable terms provided by Heady, to buy the Fern Creek home. Anderson, however, remains on Respondent's payroll, receives assistance from Respondent when needed, and is available to give assistance if called upon. When the sales agreement was reached, Anderson advised Heady that he intended to run the home using his wife, mother, son, and daughter-in-law. Accordingly, the

two employees then at Fern Creek, Lewis and Pat Conners, would be laid off at the time of sale. Both Lewis and Conners received letters dated August 31, 1981, advising them of the sale and advising them of their layoff effective the day prior to sale, September 14, 1981.

On August 18, 1981, however, before the layoff notifications were mailed, Lewis sent a letter to Heady advising him that she was continuing to engage in efforts to organize a union within the local funeral industry. In this letter, Lewis also advised Heady that she was responsible for a earlier letter, sent to other funeral directors and embalmers in the community.

In the August 31 layoff notification, Heady advised Lewis that she would be recalled to work when a "double-licensed" position, as both a funeral director and an embalmer, became available at another home. Heady also testified that, at the time of her layoff, Lewis was not transferred to another home because no "double-licensed" positions were then vacant and, as a matter of policy, junior employees at one home are not "bumped" when senior employees at another home are laid off.

Following her layoff from the Fern Creek Funeral Home, Lewis sent another letter to all funeral workers and embalmers in the Louisville area indicating her belief that she had been discharged because of union organizational efforts and further stating her intent to continue those efforts.

On September 23, 1981, Lewis filed a charge, Case 9-CA-17453, alleging that her layoff was in retaliation for once more engaging in union activities. Respondents argued to the Regional Director that they did not have any openings at any of their other funeral homes and Anderson stated that he employed only family members in the Fern Creek Funeral Home in order to keep expenses down. Based on this evidence, the Regional Director decided to dismiss the charge and Lewis, when faced with the prospect of dismissal, chose to withdraw the charge. A withdrawal approval letter was issued on November 9, 1981.

On February 5, 1982, Sheila Sayre was hired by Manager Richard Meadows as a part-time employee at the Portland home to act as receptionist, do light cleaning, and set up flowers. Sayre possessed neither a funeral director's nor an embalmer's license and worked for minimum wages. Except for a clothing allowance and workers' compensation coverage, she received no other fringe benefits. Subsequently, however, in January 1983, Sayre became an apprentice funeral director and embalmer at the Portland home where she works after school hours (9 a.m. to 1 p.m.).

Lewis became aware of Sayre's employment and, after talking to other employees of Respondents, believed that Sayre was performing the type of work that Lewis had performed prior to her layoff. Lewis responded by filing her second postsettlement unfair labor practice charge, Case 9-CA-18004, alleging in substance that she should have been recalled to the job that Sayre was hired to perform. Respondents informed the Regional Director that Sayre was hired only as a maid and to do simple duties such as cut the grass and answer the telephone. Respondent indicated that Sayre was not hired to perform funeral director's work and, therefore, Lewis was

not entitled to be recalled to this position. On that basis, the Regional Office determined to dismiss the charge. On March 8, 1982, when Lewis was confronted with this decision, she withdrew the charge.

In March or April 1982, Lewis telephoned Heady regarding possible recall. (Heady had advised Lewis to call in monthly when he notified Lewis of her layoff on August 31, 1981.) Heady then advised her that she need not call in every month because he did not anticipate any openings for a double-licensed employee. Lewis testified that Heady also asked her if he could ask a question and if she would give an honest answer. Lewis replied "yes" and Heady asked if she honestly thought she would get back at a funeral home or back to work. Before she could answer, Heady continued by saying, "Well, I hope you don't think you are coming back to work for me because you are not or for anybody else."

Heady testified that he told Lewis she need not bother calling as he did not anticipate any opening in the near future and that she would simply be wasting her time and his. He testified that he did not anticipate such openings because of the earlier formation of KAMS to perform embalming services.

Meanwhile, during the summer of 1982, Lewis had become increasingly suspicious that Sayre was performing more than simple duties. She contacted the Portland Memorial Home and spoke to Sayre (posing as a potential customer for the funeral home), and stated that she had a sickly aunt in Corona, California, whom she anticipated would not live much longer, and sought to make prospective funeral arrangements. Sayre went through the questions and provided the information that a fully licensed funeral director normally would to obtain the customer's business and to prepare for a funeral. Sayre admitted that no licensed funeral director was available at the premises at that time and testified that this was the first time she had ever taken such information. The call convinced Lewis that she had been justified in her prior unfair labor practice charge alleging that Sayre was performing funeral director licensed work and on September 10, 1983, she mailed a complaint to the Kentucky State Board of Embalmers alleging that an unlicensed person was performing funeral director's work at Portland Memorial. The State Board, composed of four funeral directors and one public member, held an informal hearing to discuss the complaint. Heady appeared to defend against the complaint and the Board was given a prepared statement by Sayre and Manager Meadows. Heady testified at the hearing that Sayre was hired as an assistant, not necessarily as a maid, and that when her licensed supervisor, Meadows, was away, 15 other double-licensed people were available and could be there to assist her in a matter of minutes. Heady also told the Board that he had many problems with Lewis, that he had to rehire her after her complaint to the NLRB, and that after she was again released she filed additional complaints that he had won. The board did not call Lewis, or otherwise investigate the complaint, but decided there was no violation of state law because the matter had not involved an actual death or performance of any actual service.

During early 1982, Heady built the new Westport home and negotiated the purchase of Respondents' Beechmont home. When they opened in July and May 1982, respectively, he had 15-20 double-licensed employees already on the staffs of funeral homes in the three corporations and considered that he had a sufficient number of employees to fill the need to supervise or conduct sporadic or emergency embalming or cosmetic work not done by KAMS at the new locations.

Lewis next became aware that three apprentice employees of Respondent were earning their funeral director's licenses and were going to be promoted to that position. Lewis felt she should be given one of the funeral director positions rather than permitting Respondent to promote an apprentice from within and on October 6, 1982, a charge in Case 9-CA-18803 was filed on behalf of Lewis by General Drivers, Warehousemen & Helpers, Local Union #89. This charge was dismissed on November 12, 1982, for the reason that investigation had failed to establish that any position was available to which the Employer could recall Carol Lewis and that the Employer has not hired any new licensed funeral director/embalmers since Lewis' layoff, and that, although the Employer did retain certain apprentices after they obtained funeral director/embalmer licenses, it has always done so and there is no evidence that the Employer has a "bumping" system or past practice of recalling laid-off employees to funeral director/embalmer positions when currently employed apprentices obtain their licenses for such work. (As subsequently developed on this record, however, this had never been a problem inasmuch as Lewis is shown to have been the first employee ever laid off from the Respondents.)

On January 9, 1983, Lewis was served with a lawsuit filed in December 1982, in Jefferson Circuit Court, Civil Action No. 82-CI-10416 in which Respondents seek \$150,000 in damages from Lewis for malicious prosecution and abuse of process based on her filing of four unmeritorious charges with the NLRB and the State Board. Lewis filed an appropriate answer and counterclaim denying the allegations and seeking damages and attorney's fees. Thereafter, on January 27, 1983, Lewis filed the charge in Case 9-CA-19249 which is the subject of the instant 8(a)(4) litigation.

On February 1, 1983, Alan Shawler was hired to replace a Phil McConathy as an assistant at Portland Memorial's Beechmont home. Shawler previously had been employed by Respondent on at least two prior occasions and had performed some funeral director's work. As of February 1983, Shawler held a single license as a funeral director. Heady testified that Shawler's duties embraced everything that is done by a fully licensed funeral director but that he was hired on a part-time basis and started at \$200 a week (his current salary is \$225 a week) with no fringe benefits. It is shown, however, that he also resides, rent free, at an apartment in the funeral home but that he bore the expenses of some remodeling and re-decorating. At the time Lewis was laid off in September 1981, she received \$4.50 an hour plus numerous fringe benefits (she would currently receive \$5.50 an hour as double-licensed employee had she not been laid off). Heady testified that as a part-time employee Shawler

works 30 to 40 hours a week; however, he also gave an affidavit to the Board which stated Shawler was being paid a minimum wage of \$3.35 an hour. In explanation, he further testified that, if Shawler worked in excess of 40 hours at time and a half, his salary could approximate one calculated relative to the minimum wage.

Heady testified that he hired Shawler, rather than recalling Lewis, because he needed only a single-licensed employee at the Beechmont home, did not wish to pay the higher scale of a double-licensed employee, and was offering only part-time employment. Since the assistant's job involved no benefits, part-time work, and no requirement of a double-license, Heady did not regard the position as equivalent to Lewis' prior job as a double-licensed funeral director. Further, the Beechmont home had lost money during its most recent fiscal year. Accordingly, Heady testified he could not justify paying for a double-licensed employee where an embalming license was no longer needed because of Respondents' use of the separate KAMS embalming service. Heady admitted, however, that Lewis was qualified to perform the job that Shawler performed.

Lewis subsequently learned that Shawler had been hired while she still had not been recalled and, on February 23, 1983, she filed her charge in the instant 8(a)(3) proceeding.

In addition to the facts set forth above, certain other background or related information was presented. David Smith testified that during the fall of 1980, while he was an apprentice embalmer and funeral director at Respondents' Oak Street home, he had a conversation with Manager Pat Dineen of the Portland home, who told him that at a meeting for all of Respondents' managers a discussion was held where it was said by Manager Ronald Sparks of the Oak Street home that anyone connected or involved with the Union would be gotten rid of and Smith's name was mentioned. As noted, Smith was "transferred" to KAMS in April 1981. In March 1982, he spoke with Manager Sparks about getting off the embalming service and back on the funeral home staff. Smith mentioned Lewis' status and Sparks said that in his opinion Heady would sell a funeral home before he would hire Lewis back.

On May 20, 1982, Smith was terminated from KAMS by Manager Ed Beatty. The reason given was that he had a bad attitude. He asked for and was granted a meeting with the manager and all board members, including Heady. Smith asked Heady about being put back on funeral staff. Heady replied to the effect that he would have to hire Lewis back first, that Lewis had caused him a lot of headaches, that he did not want her coming back causing trouble, that he had dealt with employees such as Smith with a bad attitude, and that one rotten apple spoils the whole barrel. Heady did not deny the conversation but testified that he did not recall using the term "rotten apple."

Smith subsequently started his own independent embalming service and, during October 1982, visited Manager-Owner Anderson at the Fern Creek funeral home to ask about the possibility of Anderson's use of his service. At the end of the conversation Anderson told Smith he

hoped Smith did not feel he did anything to get Smith fired and added that the only reason Lewis was dismissed was because of her union activities.

Smith also gave his opinion as a licensed embalmer, familiar with applicable state rules and regulations, that an embalmer's license is required to do restoration work and that that type of work was commonly done at the Respondents' homes, separate from the basic embalming process. Lewis also testified regarding certain functions that occasionally were required to be performed on a body subsequent to the basic embalming process which necessitated the services of a licensed embalmer. Heady, on the other hand, testified in effect that these services could be performed by others, if under the supervision of a licensed embalmer, and that he and Respondents' present double-licensed employees were available to provide such supervision under short notice, thereby doing away with the need to have a licensed embalmer at each funeral home.

David Cox, a former employee of Respondents who was involved in one of the earlier withdrawn charges, testified regarding a phone conversation he had during January 1983 with William Anderson, his former supervisor at the Fern Creek home. After some general conversation Cox mentioned that he was working in industrial painting which was unionized and had much better pay than at Respondents. Cox testified that Anderson then made a comment to the effect that he thought Lewis would still be working for Respondents were it not for the union business.

III. DISCUSSION

A. Alleged Failure to Recall

As noted in the above discussion of jurisdiction, I find Respondents Highlands Central and Portland Memorial to be a single employer. During the course of the hearing certain testimony occurred which purported to be the witnesses' recollection of what was said by Ronald Sparks, Pat Dineen, and William Anderson. Sparks and Dineen were supervisors, they were not called to refute the testimony by David Smith, who was otherwise a credible witness, and I credit his testimony to the effect that Sparks said at a managers meeting, in the fall of 1980, that anyone connected or involved with the Union would be gotten rid of and that subsequently, in March 1982, after Lewis was laid off, Sparks gave his "opinion" that Heady would sell a funeral home before he would hire Lewis back. Although Respondents assert that the latter statement is inadmissible as it is unsubstantiated opinion concerning the state of mind of another, I find that it tends to tie in with the other remark attributed to Sparks and was properly admitted into the record, although standing alone it clearly cannot be considered to establish that Heady in fact would do as Sparks speculated. Sparks' opinion, however, does not stand alone inasmuch as, shortly after the remark to Smith, Heady himself told Smith that Lewis had caused him a lot of headaches and he did not want her coming back and causing trouble. The latter remarks were not refuted by Heady, although he specifically testified he did not recall using

the term "rotten apple" in an additional remark attributed to him by Smith.

In a similar vein, the opinion comment made by former Supervisor Anderson to former employee Cox to the effect that he thought Lewis would still be employed were it not for the union business, standing alone, might be of little probative value. Although the statement is hearsay, Anderson formerly held a supervisory position with Respondents and still maintains significant financial ties with Heady and, thus, in the light of related evidence, I find it to be competent and not inadmissible.

In substance, the comments by Anderson and Sparks tend to show that Respondents' managers, during the background period, thought that Respondents' chief officer regarded Lewis with feelings of animus because of her union activity. These opinions corroborate testimony by Lewis and by Smith which attribute union animus directly to Heady (who admittedly was aware of Lewis' union activities). First, in February 1981, when Lewis had been recalled after her initial union activities and first discharge, but prior to the settlement of her first Board charge, Heady exclaimed, "No union, there won't be any union," in the presence of Lewis and Reverend Hancock. Then, during the spring of 1982, after the separate embalming service was formed and while Heady was building his new Westport home and negotiating to buy the Beechmont home (Westport opened July 11, 1982, and Beechmont was acquired in May 1982), Heady told Lewis not to call as he did not anticipate any openings and then questioned whether she honestly thought she would be called back.

Animus may also be inferred by the showing that Heady also stated to the Kentucky Board of Embalmers that he had many problems with Lewis and had to rehire her after her complaint to the NLRB and the fact that he filed a lawsuit against her alleging malicious prosecution based on her charges with the NLRB and the State Board. Although the latter matter is the subject of a separate charge, discussed below, I believe that it may otherwise be evaluated independently as it relates to the issue of animus and I conclude that, under all the circumstances discussed above, the General Counsel has shown the existence of union animus directed toward the Charging Party.

I further conclude that the General Counsel has met his initial burden in a case of this nature by presenting a prima facie showing sufficient to support an inference that Lewis' union activities were the motivating factor in Respondents' failure to recall Lewis.

Respondents contend that they have acted in good faith and for valid business purposes, both before and after Lewis was laid off in September 1981, with the commitment to recall her when a "double-licensed" position (both funeral director and embalmer) became available at another home.

The record shows union animus directed towards Charging Party Lewis contemporaneous with the issuance of the Board's complaint in late 1980. Although Lewis was recalled after her initial discharge and a settlement of the Board's complaint subsequently was reached, several business decisions were made by Heady.

Respondents' chief officer, that would place Lewis' future employment in jeopardy. First, Heady participated in the formation of KAMS, the separate embalming service which made it possible to operate Respondents' homes without a major need for as many licensed embalmers. Although Heady asserts KAMS is operated independent of his control, it is noted that former employee Smith testified that he "transferred" to KAMS from one of Respondents' homes when KAMS was formed and he also asked Respondents Manager Sparks about getting off the embalming service and back to the funeral home staff and made a similar request to Heady. There is no indication that any offer was made to Lewis that would have given her the option of transferring. Shortly thereafter, however (for reasons attributed to poor profitability, cash flow, and tax considerations), the Fern Creek home where Lewis worked was sold and she was laid off.

Lewis was laid off, but told she would be recalled when a "double-licensed" position became available at another home. Respondents have had no such positions available since that time; however, they have promoted three apprentices and they hired Sheila Sayre to an unlicensed position at the Portland home in February 1982. Subsequently, she became an apprentice and, in the near future (if she finishes school and passes appropriate exams), also will be in a position to take a "double-licensed" position within the framework of Respondents' "policy" of internal promotion of apprentices. Respondents assert no past practice of recalling laid-off employees under such circumstances but it appears there were no such layoffs prior to that of Lewis.

In mid-1982, Respondents purchased a home and also built a new home using, in part, the cash flow obtained from the sale of the Fern Creek home where Lewis had been employed. However, staffing of these homes was accomplished by using existing employees and Lewis was not recalled.

Finally, in February 1983, Respondents hired Allen Shawler for the single license position as a funeral director at its Beechmont home. Respondents rationalized the hiring of Shawler and the nonrecall of Lewis by asserting that the position calls for only a single license, that they would have to pay Lewis more because of her double licensing and past fringe benefits, and that as the position was part time they did not believe Lewis would be interested. Respondents imply that Shawler's pay and benefits were less than Lewis would expect to receive; however, as pointed out by the General Counsel, Lewis would have been earning more than she had prior to her second layoff/discharge had she been offered the job that Shawler had.

Respondents assert valid business reasons for the series of related events which surrounded the layoff of union activist Lewis. Separately, Respondents' policies and reasons have an appearance of validity which is reflected in the Regional Director's decisions not to issue complaints regarding the earlier occurrences. Collectively, however, they show a pattern that goes beyond coincidence and suggest that, in order to avoid problems with Lewis and her attempts at union organization, Respondents have intentionally made business decisions that would maximize

the chance that they could avoid having to recall Lewis at any time in the near future.

Most specifically, however, I find Respondents' noted reasons for hiring Shawler as funeral director at the Beechmont home, in lieu of recalling Lewis, to be pre-textual and this supports the inference that the real reason is an invalid one. Certainly, the hours involved were not temporary or part time and the pay and benefits Shawler received were comparable to what Lewis had last been paid. Also, she was more qualified and could have performed occasional accessorial embalming tasks without the need to call in anyone else, and yet she was not consulted or given the opportunity to accept or reject the position available. Moreover, the overall pattern of Respondents' conduct in attempting to specifically qualify its recall statement to Lewis in terms of a "double-licensed" position, while also substantially eliminating any future need for a "double-licensed" employee, supports the conclusion that Respondents' last action in failing to offer recall to Lewis for the position that was available at the Beechmont home was motivated not by the reasons given but because of Respondents' animus and desire to avoid recalling Lewis because of her past union activities and her filing of charges with the Board.

Under these circumstances, I conclude that the General Counsel has shown that by not offering Lewis recall to the funeral director's position filled at their Beechmont home on February 8, 1983, Respondents discriminated against her in violation of Section 8(a)(1) and (3) of the Act as alleged.

I also find that the Respondents should be obligated to recall Lewis to a "position substantially" equivalent to the one she previously held. I further find that her previous embalming duties were essentially accessorial to those required of a funeral director, and that the functions now performed by Respondents' single license funeral directors are essentially equivalent to those previously performed by Lewis.

B. Alleged Retaliatory Lawsuit

The issue embraced in Case 9-CA-19249 relates to the General Counsel's allegation that Respondents filed a retaliatory and baseless lawsuit against Lewis and thereby violated Section 8(a)(1) and (4) of the Act.

At the hearing and in subsequent pleadings, the General Counsel urges that this matter be severed from those under consideration in the recall proceeding, pending conclusion of the state court proceeding, citing the recent decision of the United States Supreme Court in *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161 (1983). Because of Respondents' objection, I declined to grant the motion at the hearing and a record was developed pertaining to the 8(a)(4) allegation. On brief, Respondents argue that the lawsuit against Lewis is meritorious under Kentucky law, has a reasonable basis in fact, and does not constitute unlawful retaliation.

The two separate complaints involved herein were consolidated prior to hearing and, inasmuch as they involve many common factors, including witnesses and background and other factual information, it was and is administratively appropriate that they be heard on a

common record. The *Bill Johnson's* case, *supra*, was decided shortly before the hearing opened and its holding pertaining to the propriety of the Board's going forward in deciding an 8(a)(1) and (4) proceeding, before the state court suit has been concluded, clearly has raised certain ambiguities in the eyes of the General Counsel.

Although it appears that aspects of the cases may be distinguishable, I believe the record that has been developed shows the existence of a possible factual question or state-law dispute for the state court to resolve that would aid the NLRB in its determination of whether or not the Respondents herein had a reasonable basis for their lawsuit against Lewis. Under these circumstances, the most appropriate course of action at this time is to grant the General Counsel's motion to sever and to allow the record herein to be more fully developed by gaining whatever material information that will be evidenced by the state court's concluding action, before a decision is made on whether the Respondents' prosecution of the lawsuit was unlawful under the National Labor Relations Act.

Accordingly, the embraced cases will be severed for decision and the proceeding in Case 9-CA-19249 will be stayed until the state court suit in Civil Action No. 82-CI-10416, Jefferson Circuit Court, Kentucky, has been concluded. At such time, it is expected that the parties will discuss the possibility of settlement in light of the state court decision and will file appropriate pleadings suggesting what further course of action they consider necessary and the reasons therefor, including any need or desire to supplement the record beyond the recognizing conclusions of the state court, or any need for additional argument on brief. Otherwise, however, the facts developed on this consolidated record, as supplemented by the conclusions of the state court, will be relied on to decide the 8(a)(1) and (4) issue presented in the Regional Director's complaint.

CONCLUSIONS OF LAW

1. Respondents Arch L. Heady & Son Highlands Central Funeral Home, Inc. and Arch L. Heady & Son Portland Memorial Funeral Home, Inc. are a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing to offer recall to employee Carol A. Lewis on or about February 8, 1983, because she engaged in union activities, Respondents engaged in and are engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents, having discriminatorily failed to recall Carol A. Lewis, I find it necessary to order them to offer Lewis reinstatement to a position at least the equivalent of one calling for a licensed funeral director, the position which was filled at Respondents' Beechmont Avenue home on or about February 8, 1983, by Allen Shawler, with compensation for loss of pay and other benefits, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Moreover, if Lewis is recalled to and accepts a single license position Respondents further shall give Lewis preferential promotion to the next available double-licensed position as funeral director and embalmer or its equivalent, regardless of the need for significant embalming duties, at any and all of the funeral homes operated by Respondents. Inasmuch as the record herein does not prove other violations of the Act that would clearly demonstrate a general disregard for the fundamental rights of employees, I find it unnecessary to recommend issuance of a broad order.

[Recommended Order omitted from publication.]